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No.

In the Supreme Court of the United States

October Term, 1982

UNITED STATES ex rel. JAKE LAPIN

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the District Court erred in applying the jurisdictional bar when the Plaintiff-Relator made a showing that:

(a) the federal agencies to whom the Relator made his prefiling disclosures via hot lines established by the Government to facilitate the collection of such solicited information, had failed to take the required corrective action;

(b) the General Services Administration and the United States Attorney were more concerned with concealing the fact that over the years certain Government Contracting Officers allowed the Defendant to become unjustly enriched at taxpayer's expense by hundreds of millions of dollars rather than taking that action

required by 3 Stats. 723 to discontinue these illegal contracting practice and to make the required report of their existence to the President;

(c) the information actually provided by the Relator to the Government prior to suit concerned only the omission by the Government to claim refunds due the Government and this information could not and did not alert the Government to any wrongdoing on the part of the Defendant; and,

(d) the Defendant will be permitted to permanently retain unclaimed overbillings with impunity.

2. Is the District Court's decision in accordance with expressed Congressional intent and the essential purpose of the False Claims Act?

III

3. Did the District Court err in resolving all apparent inconsistencies in the Relator's pleadings in favor of the Defendant?

IV

LIST OF ALL PARTIES

Parties Petitioner:

Jake Lapin

United States of America

Parties Respondent:

International Business

Machines Corp.

TABLE OF CONTENTS

Questions Presented I

List of All Parties IV

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved . . . 3

Statement of the Case 4

Reasons for Granting the Writ . . . 13

Conclusion 19

Appendix:

Decision and Order Granting Defendant's Motion to Dismiss for Lack of Jurisdiction of the United States District Court (May 16, 1980) A1

Opinion of the United States Court of Appeals for the Ninth Circuit (February 26, 1982) A22

Order of the United States Court of Appeals for the Ninth Circuit Denying Motion for Rehearing (April 28, 1982) A25

Table of Contents Cont.

Prefiling Disclosures of Information to Government by Relator A27

Affidavit of Relator's Supervisor Included in Pleadings A30

Relator's Original Information That Was Provided to District Court A33

TABLE OF AUTHORITIES

Cases

Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978) 8, 18, A13, A16, A17, A18, A23, A24

United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L.Ed. 443 (1943) . . 6, A13

United States v. Pittman, 151 F.2d 851 (5th Cir. 1945) cert. denied, 328 U.S. 843, 66 S.Ct. 1022, 90 L.Ed. 1617 (1946) 16, A13

United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949) . 9, 11, 14, 15, 20, A13, A16, A17

United States v. Borden Co., 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954) A20

Carlson v. Coca-Cola Company, 483 F.2d 279 (9th Cir. 1973) A20

United States v. Florida, 615 F.2d 1370 (5th Cir. 1980) 16, A23

Table of Authorities Cont.

Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), cert. denied, 441 U.S. 943 (1978) 16, A23

United States v. Aster, 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960) 16, A23

United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981) 17, A23

Statutes and Regulations

28 U.S.C. 1254 (1) 2

31 U.S.C. 231 et seq. . . . . Passim

15 U.S.C. 15 . . . . . A5, A19

15 U.S.C. 45 . . . . . A5

57 Stat. 608 . . . . . A12

31 U.S.C. 529 20

3 Stats. 723 20

12 Stats. 696 . . . . . A13

10 Op. Atty. Gen. 288 (1862) . . 20

Hawaii Revised Statutes, Chapters 480, 481, 481A A6

Miscellaneous

Rule 12(b)(1), F.R.C.P. A2

Rule 56(f), F.R.C.P. A9

89 Cong. Rec. 10849 (Dec. 17, 1943) A15

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The Petitioner, Jake Lapin, respectfully asks that a Writ of Certiorari issue to review the final opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 26, 1982. Rehearing was denied

on April 28, 1981, which action overruled and denied Petitioner's Petition for Rehearing of the Court's decision entered February 26, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished Memorandum No. 80-4312, DC No. 79-0264, dated February 26, 1982. The District Court for the District of Hawaii's opinion is reported in 490 F. Supp. 244. All opinions appear in the Appendix herein.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on February 26, 1982. A timely Petition for Rehearing was denied on April 28, 1982, and this petition was filed within 90 days of that date. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 31, Sections 231 et seq.

(The above provisions deemed pertinent are set out in detail in App. A1 of this petition.)

STATEMENT OF THE CASE

On June 15, 1979, Petitioner-Relator Jake Lapin filed a qui tam action, pursuant to the False Claims Act, 31 U.S.C. 231 et seq., on behalf of himself and the United States against International Business Machines Corp. ("IBM"). The complaint alleged that IBM had made false claims upon the Government in the form of overbillings for rentals of automatic data processing ("ADP") equipment by the various federal agencies and it sought to assess the fines and forfeitures against IBM prescribed by Section 231.

First enacted in 1863 to protect the Government against false claims during times of war, the False Claims Act has been used regularly to prosecute frauds since its enactment. The most

striking provision of the Act, section 232(B), allows qui tam actions -- suits by private citizens on behalf of the Government as well as themselves. If a suit by a qui tam plaintiff leads to recovery, the plaintiff is entitled to a portion of the recovery under section 232(E).

Petitioner-Relator Lapin commenced this action pro se and disclaimed any reward in the event the Government would take over the suit. Section 232(C) gives the Attorney General of the United States the opportunity to enter the suit and prosecute it. In its report to the District Court, the United States, by the Acting Assistant Attorney General, declined to enter the suit. It stated its "opinion that its rights (could) be more effectively asserted under the

contract and through administrative channels" and its concern that subject matter jurisdiction may be lacking under the 1943 amendments to the Act.

The Act was substantially amended in 1943 following the decision in Marcus v. Hess, 317 U.S. 537 (1943). That case construed the Act to allow "parasitic" suits, that is, suits based solely upon information obtained from the Government, including, for example, from Government indictments. The 1943 amendments were intended to stem the flood of parasitic suits by denying jurisdiction in federal courts for suits based on information in the possession of the Government when the suit was filed.

Because the Petitioner-Relator commenced this action pro se, the district court refused to allow the

United States to be represented on a pro se basis. Thus, Petitioner-Relator obtained counsel on November 2, 1979 and filed a First Amended Complaint on December 26, 1979.

IBM moved to dismiss the action because it considered the prefiling disclosures of information to Government by Relator (App. A27) and affidavit by Relator's supervisor (App. A30) to be an admission that Relator gathered information regarding the alleged fraud while he was an employee of the Government and prior to filing Relator had informed the Government of the basis of his claim. There were some apparent inconsistencies in the Relator's pleadings and these were resolved in favor of Defendant.

IBM's motion to dismiss was heard

on March 17, 1980 and on May 16, 1980, the district court issued a decision and order granting Defendant IBM's Motion to Dismiss for lack of subject matter jurisdiction. The district court ruled that section 232(C) of the False Claims Act deprived the court of jurisdiction.

There are four major points in the ruling. First, that decision purported to apply the rule laid down by the Ninth Circuit in Pettis v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978), that section 232(C) precludes jurisdiction where the informer gives his "information" to the Government before filing suit and then the Government fails to enter the suit. The district court stated that since "Lapin has told the United States the suspicions upon which he bases his suit," his action was barred.

Second, the decision recognized the exception to the jurisdictional bar established in United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949), where the information on which the suit is based is already possessed by a Government employee, but that person has participated in the fraud and is interested in concealing it. The district court said it found no specific support for the Rippetoe exception in the record.

Third, the decision briefly treated the issue of how much information in the hands of the Government at the time of the suit is sufficient to raise the jurisdictional bar. On this point, the district court again claimed it followed the Pettis decision. The district court held it was unnecessary to examine the amount of information because "Lapin

does not even allege that he has more information than does the Government."

Finally, the decision said that there was no "reason to delay ruling ... pending discovery, since it is not even alleged that such discovery would show that Plaintiff-Relator had more information than did the Government at the time the suit was filed."

Plaintiff-Relator thereafter timely moved for reconsideration of the decision and order. In the affidavits and exhibits submitted with the motion and memorandum that followed, the Plaintiff-Relator addressed each of the four points in the decision and order. Primarily these materials showed from the Record that the suit was based on original information in the hands of the Plaintiff-Relator at the time of filing (See App. A33) and

that the information possessed by the Government at that time was negligible. The materials also demonstrated support in the Record for excepting this suit from the jurisdictional bar under the rule in Rippetoe or under a similar rationale. In a short memorandum Defendant IBM opposed reconsideration on procedural grounds.

On June 9, 1980, Judge King denied the motion for reconsideration without elaboration. Plaintiff-Relator thereafter made timely appeal to the United States Court of Appeals for the Ninth Circuit on June 10, 1980. Oral argument was held on January 12, 1982 which was limited to fifteen minutes per party, and a memorandum decision was issued on February 26, 1982. On March 9, 1982, Relator Lapin, acting pro se, filed his

Petition for Rehearing and on April 28, 1982, such Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The Courts of Appeal are in conflict with respect to the question of whether an informer can file and prosecute a 31 U.S.C. 232 qui tam action after such informer provides certain information concerning false claims and the Government either fails to take action on such disclosures or elects not to take over the suit.

This question is of considerable importance in view of the fact that the General Accounting Office has determined that the United States is overcharged by about $25 billion each year.

Presently, practically every federal agency has established its own hot line for the purpose of soliciting information from the public concerning fraud, waste, and/or abuse in Government

for the purpose of taking corrective action on such disclosures. However, corrective action is not always taken because the Department of Justice's Civil Divison is not adequately staffed to prosecute actions for the recovery of false claims that were paid by the Government. Also, there have been numerous instances where the federal agencies, after becoming aware of false claims, prefer to conceal them or frustrate any private prosecution because such false claims were made possible because Government officials violated federal laws and regulations.

Within this scenario the Courts of Appeal are in conflict as to the right of an informer to bring an action. For example, the Fourth Circuit, in United States v. Rippetoe, 176 F.2d 753

(4th Cir. 1949), is the most liberal in allowing the private prosecution of 31 U.S.C. 232 actions. In addition to not requiring that the Relator negative information alleged to be in the hands of the Government, Rippetoe allows exceptions to the literal language of the statute to carry out the legislative purpose and to avoid absurd consequences. Indeed, Rippetoe makes an exception where there is a showing that Government employees were either a party to the transactions which enabled the false claims to be paid or desire to conceal the fact that such false claims were, in fact, paid. Thus, under Rippetoe, neither the Government nor the unjustly-enriched Defendant would be able to frustrate any efforts on the part of an informer to privately prosecute a

31 U.S.C. 232 action after the Government declines to enter the suit.

The Second, Third, and Fifth Circuits allow an informer to prosecute an action after the Government declines to take over the suit when the informer can show that he possessed original information that he did not disclose to the Government prior to filing suit. Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), cert. denied, 441 U.S. 943 (1978); United States v. Aster, 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960); United States v. Pittman, 151 F.2d 851 (5th Cir. 1945), cert. denied, 328 U.S. 843 (1946); United States v. Florida, 615 F.2d 1370 (5th Cir. 1980).

The District of Columbia Circuit allows an informer to prosecute a

31 U.S.C. 232 action after the Government refuses to take over the suit when the information in possession of the Government prior to the filing of the suit could not have alerted the Government to any wrongdoing on the part of the Defendant. This Circuit also requires that any inconsistencies in the Relator's pleadings be resolved in favor of the Relator. United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981).

The Ninth Circuit has established a functional test rather than apply the comparative test previously used by the Second, Third, and Fifth Circuits and thus will not allow an informer to prosecute an action when the evidence and information in possession of the United States at the time the False Claims Act eas brought was sufficient to enable it

adequately to investigate the case and to make a decision whether to prosecute. Pettis v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978).

CONCLUSION

The Ninth Circuit Court of Appeals should have overruled the district court and allowed the private prosecution of this suit to judgment because the Relator made a showing that:

(1) The Government could never have had sufficient information to investigate the case and decide whether to prosecute because it neither maintained the necessary records nor preserved an audit trail from which it could reconstruct computer rental transactions during the years the 1410 model was replaced with a 360 series model computer;

(2) A typical overbilling for replacing a second-generation 1410 model computer with a third generation 360/50 model computer during 1968 amounted to $56,000 because the required performance

testing period was delayed for the purpose of setting up the replacement computer to accommodate the same programs used by the replaced computer;

(3) The Public Record discloses that the General Services Administration allowed its Contracting Officers to permit the Defendant to engage in billing practices which were specifically prohibited by 3 Stats. 723, 31 U.S.C. 529, and 10 Op. Atty. Gen. 288 (1862) and then concealed these facts it the report it made to Congress via the Special Counsel to the Merit Systems Protection Board;

(4) The Rippetoe exception and/or a Rippetoe-like exception puts the Relator outside the scope of the jurisdictional bar because the Public Record on file with the Merit Systems Protection Board's

Office of the Special Counsel discloses that the United States Attorney responsible for prosecuting this action, after declining to enter the suit, then took action to prevent the FBI from completing an investigation underway of IBM's billing practices;

(5) All and any inconsistencies in Relator's pleadings were wrongfully resolved in favor of Defendant;

(6) The jurisdictional bar was never intended by Congress to apply to non-parasitical suits where the Relator had previously disclosed to the Government information that it had solicited by virtue of its expressed or implied promise to take the necessary corrective action and then refuses to take the corrective action required by federal law;

(7) The literal application of the amendment language defeats the essential purpose of the statute and leads to the absurd consequence of IBM being able to permanently retain with impunity hundreds of millions of dollars it illegally overbilled the Government; and,

(8) The Respondent is a judicially-recognized whistle blower entitled to statutory protection in his endeavor to correct that waste, fraud, and/or abuse that he had previously disclosed to the Government for the expressed purpose of correction and thus can assume the role of a private United States Attorney when the Government, through its own Attorney, fails to act under the mandate of federal law requiring it to act.

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May 28, 1982